

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)

HAWAIIAN TELCOM, INC.)

DOCKET NO. 05-0158

For Approval to License Ground)
Space at Kulani Cone Located in)
Hilo, Hawaii.)
_____)

DECISION AND ORDER NO. 22039

Filed Sept. 21, 2005
At 8 o'clock A.M.

Karen Higashi
Chief Clerk of the Commission

DIV. OF CONSUMER ADVOCACY
DEPT. OF COMMERCE AND
CONSUMER AFFAIRS
STATE OF HAWAII

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ATTEST: A True Copy
KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

K. Higashi

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DECISION AND ORDER

By this Decision and Order, the commission approves HAWAIIAN TELCOM, INC.'S ("Hawaiian Telcom") request for approval to license ground space at Kulani Cone in Hilo, Hawaii to the County of Hawaii ("License").

I.

Procedural History

Hawaiian Telcom filed its Application requesting commission approval to license ground space at Kulani Cone in Hilo, Hawaii to the County of Hawaii ("County" or "Licensee") on June 24, 2005 ("Application"). Hawaiian Telcom makes its request under Hawaii Revised Statutes ("HRS") § 269-19 and Hawaii Administrative Rules § 6-61-105. Moreover, Hawaiian Telcom requests approval of its Application by September 22, 2005, to allow the County to meet its proposed construction schedule.

Hawaiian Telcom served the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate") with a copy of the Application.

On July 5, 2005, the Consumer Advocate served Hawaiian Telcom with information requests ("IRs"). Hawaiian Telcom filed responses to the issued IRs on July 12, 2005 ("Response"). On July 26, 2005, the Consumer Advocate filed its Statement of Position informing the commission that it does not object to the approval of Hawaiian Telcom's Application ("Statement of Position").

Subsequently, by letter dated July 28, 2005, Hawaiian Telcom: (1) elaborated on its response to CA-IR-2, explaining why it had not completed a valuation study as required for all lease and license agreements under Decision and Order No. 20269¹ in connection with the License; and (2) requests that we grant it a waiver from this requirement ("Waiver Request").

II.

Hawaiian Telcom's Requests

The Kulani Cone property is owned by Kamehameha Schools Bishop Estate ("Owner") and is leased by Hawaiian Telcom.

¹The commission, in Decision and Order No. 20269, filed on June 27, 2003, in Docket No. 02-0047 (*In re Verizon Hawaii, Inc. for Approval to License and Sublicense Property at 16 Locations to Island Page, Inc. (Island Page)*), ordered Hawaiian Telcom, formerly known as Verizon Hawaii Inc., to "provide valuation studies, comparable market analyses, and any other information that supports the negotiated lease rent with any future applications for the approval of a lease agreement" ("Valuation Filing Requirement"). See, *Island Page* at 7.

Hawaiian Telcom represents that the County will use the property to "maintain and operate a microwave tower and equipment shelter to host certain communications equipment belonging to the Licensee and other public agencies as identified in the agreement."² Hawaiian Telcom also contends that communications equipment will be used for public safety purposes. Hawaiian Telcom incorporated a copy of the License Agreement, dated February 24, 2005, as Exhibit I to the Application. Additionally, in support of its request, Hawaiian Telcom also included as part of its Application, affidavits of The Honorable Harry Kim, Mayor of the County of Hawaii and Mr. Elroy Osorio, Assistant Chief of the Hawaii County Police Department, as Exhibits II and III, respectively.

The License Agreement is for a term of approximately fourteen (14) years, commencing upon approval of the Owner and expiring on August 31, 2018.³ In exchange for granting Licensee access and use of the property, Hawaiian Telcom (the Licensor) shall be paid a license fee of ten dollars (\$10.00) per year.⁴ In concurrence with the execution of the License Agreement, the County is required to also pay Hawaiian Telcom a one-time administrative fee of six-thousand dollars (\$6,000.00) for costs and services associated with entering into the agreement.⁵

²See, Application at 2.

³See, Section 3 of License Agreement, Exhibit I of Application at 3.

⁴See, Section 2.1 of License Agreement, Exhibit I of Application at 2.

⁵Ibid.

The License Agreement sets forth various terms and conditions for the License including, but not limited to, provisions governing the County's construction on and use of the property (Section 4), non-interference requirements and restrictions (Section 6), and indemnification and insurance requirements (Sections 9 and 10, respectively).

Hawaiian Telcom represents that the basis for requesting expedited approval of the Application is set forth in the affidavits of Mayor Kim and Assistant Chief Osorio. Hawaiian Telcom contends that "[a]s stated in Mayor Kim's affidavit, the planned microwave tower and equipment shelter at the site is in the public safety interest as it will serve as the entire backbone of the entire radio communications system of many government and private agencies."⁶ Moreover, Hawaiian Telcom reiterates Assistant Chief Osorio's statement that the new microwave tower will be able to withstand one-hundred (100) miles-per-hour winds and that the radio system will be upgraded from analog to digital technology.

Hawaiian Telcom also requests a waiver of the Valuation Filing Requirement for the matters of this docket. Hawaiian Telcom states that it did not complete an evaluation study in connection with the License since it entered into the License Agreement with the County under the threat of condemnation. It asserts that conducting a market study regarding the License would have extended the negotiation process and increased the potential that the County would condemn the

⁶See, Application at 2.

property. Hawaiian Telcom contends that its primary focus during the negotiations with the County was to: (1) maintain future use of the property; and (2) recover a portion of its rent. Hawaiian Telcom represents that "[i]f the County condemned the property, Hawaiian Telcom would have lost its right to operate at the site and would have been forced to relocate its facilities to an alternative site[, and that] . . . there would have been no guarantee that Hawaiian Telcom could obtain an alternative site for the nominal rent charged under the existing lease."⁷ Moreover, Hawaiian Telcom asserts that the negotiated license fee is fifty percent (50%) of its current rent obligations for the property and that the County agreed, as set forth in the License Agreement, to pay for ninety percent (90%) of the costs to maintain the access road to the property.

III.

Consumer Advocate's Position

The Consumer Advocate states that it does not object to the approval of Hawaiian Telcom's Application. The Consumer Advocate's position is based on the following findings and determinations. First, the Consumer Advocate believes that the License Agreement will not result in discrimination against other carriers that are not part of this proceeding since Hawaiian Telcom has executed similar agreements

⁷See, Response to CA-IR-2. See also, Hawaiian Telcom's July 28, 2005 Letter.

with Island Page, Inc. and Metrocall, Inc.⁸ Thus, the Consumer Advocate concludes that the terms and conditions of the License Agreement in the instant Application are reasonable.

Second, the Consumer Advocate finds the license fee of ten dollars (\$10.00) per year to be reasonable. The Consumer Advocate based this finding on the following factors:

1. The Licensee, the County of Hawaii, is a municipal organization of the State of Hawaii and is not a "for profit" entity.
2. The County has the capability to condemn the property for its use as an alternative to the Lease Agreement.
3. The property will be used for public service and public safety purposes.
4. The potential costs of relocating Hawaiian Telcom's facilities and the possibility of having to incur higher rents for an alternative site if the property is condemned, could negatively impact regulated rate payers.
5. Hawaiian Telcom will be recovering fifty percent (50%) of its remaining rent obligations and the collected fees will have a small positive impact on regulated rate payers.

Moreover, the Consumer Advocate contends that the six-thousand dollar (\$6,000.00) administrative fee is reasonable when compared

⁸See, Statement of Position at 3.

to similar administrative fees Hawaiian Telcom charged commercial entities in the past. Accordingly, the Consumer Advocate will not object to the fees associated with the License Agreement.

Finally, the Consumer Advocate states that the following considerations and factors support a finding that the License Agreement is in the public interest:

1. The facilities being installed under the License Agreement are a critical part of the backbone of the communications infrastructure of the county government agencies and various state, federal, and private entities that serve the island of Hawaii.
2. The License Agreement will allow for the installation of facilities that will be part of the upgrade of the County's emergency radio communications and land mobile radio network. Users of the system include the County's public works, fire, and police departments; the Emergency Medical Services Branch of the State Department of Health; and several federal agencies.
3. The License Agreement would avoid condemnation of the property, allowing Hawaiian Telcom's facilities to remain at this presumably optimum location to continue serving its regulated customers in that area.
4. Hawaiian Telcom does not need the ground space being licensed under the License Agreement for the

provision of regulated services during the term of the agreement.

IV.

Discussion

Under HRS § 269-19, a public utility is required to obtain commission approval prior to, among other things, leasing or otherwise disposing of, or encumbering the whole or any part of its road, line, plant, system or other property necessary or useful in the performance of its duties to the public.

Upon review, the commission finds it reasonable and in the public interest to approve Hawaiian Telcom's request to license ground space at Kulani Cone to the County. The terms and conditions of the License Agreement appear to be reasonable since, as the Consumer Advocate notes, they are consistent with the terms and conditions of other similar agreements approved by the commission. The fees associated with the License also appear to be reasonable since, among other things, the ten dollar (\$10.00) a year license fee represents half of Hawaiian Telcom's rent obligations associated with the property. Moreover, approval of the License Agreement appears to be in the public interest. First, the County's use of the property should not adversely impact or interfere with Hawaiian Telcom's operations and ability to provide telecommunications services to the public. The License Agreement contains several provisions clarifying that the County's use of the property shall not interfere with

Hawaiian Telcom's, the Owner's, or any agent's use of the site.⁹ Hawaiian Telcom also represents that it does not currently need the ground space that the County is proposing to occupy under the License Agreement for the provision or maintenance of regulated services during the term of the agreement.¹⁰ Additionally, as set forth in Mayor Kim's affidavit, the County and the other governmental agencies will use the property under the License Agreement for public safety purposes.¹¹ Moreover, had the negotiations with Hawaiian Telcom failed, the County would have sought to condemn the property, requiring Hawaiian Telcom to find an alternative site for its facilities which may have resulted in additional costs, negatively impacting Hawaiian Telcom's rate payers.

Furthermore, we find Hawaiian Telcom's request for a waiver of the Valuation Filing Requirement, in this instance, to be reasonable. Our determination regarding this matter is based on our review of the various factors and circumstances of this docket including Hawaiian Telcom's representations set forth in its response to CA-IR-2 and its July 28, 2005 Letter. As Hawaiian Telcom explains, it entered into the negotiations of the License with the County under the threat of condemnation. Accordingly, Hawaiian Telcom's dual focus of maintaining future use of the property and to recover a portion of its rent

⁹See, Sections 4.6 and 6 of License Agreement, Exhibit I of Application at 4, 6-7.

¹⁰See, Response to CA-IR-5.

¹¹See, Exhibit II of Application at 2.

obligations during the negotiations as opposed to conducting a market study of the subject area, appears to be logical and reasonable. Additionally, we agree with Hawaiian Telcom's contention that conducting an evaluation study of the subject property would have prolonged the negotiation process and increased the potential that the County would have condemn the property.¹²

Based on the above, the commission concludes that the License Agreement, described in the Application, should be approved. The commission also concludes that Hawaiian Telcom's request for a waiver of the Valuation Filing Requirement regarding the instant License Agreement should be granted.

V.

Orders

THE COMMISSION ORDERS:

1. Hawaiian Telcom's Application, filed on June 24, 2005, for commission approval to license ground space at Kulani Cone in Hilo, Hawaii to the County of Hawaii, as set forth in the License Agreement, is approved.


2. Hawaiian Telcom's Waiver Request, filed on July 28, 2005, of the Valuation Filing Requirement, is granted.

¹²While the Consumer Advocate requested Hawaiian Telcom to provide evaluation studies as required under *Island Page* (see, CA-IR-2), the Consumer Advocate, in its Statement of Position, did not mention or object to Hawaiian Telcom's failure to adhere to the Valuation Filing Requirement as a basis for denying the Application.

3. This docket is closed, unless ordered otherwise by the commission.

DONE at Honolulu, Hawaii SEP 21 2005.

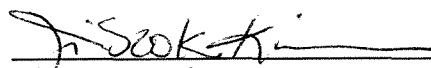
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By (EXCUSED)
Wayne H. Kimura, Commissioner

By 
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:


Ji Sook Kim
Commission Counsel

05-0158.en

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 22039 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
DIVISION OF CONSUMER ADVOCACY
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Karen Higashi

DATED: SEP 21 2005